

No. PD-1124-20

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

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COURT OF CRIMINAL APPEALS
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ON REVIEW FROM THE COURT OF APPEALS FOR
THE SIXTH DISTRICT OF TEXAS AT TEXARKANA
No. 06-19-00221-CR

JACE MARTIN LAWS,

V.

THE STATE OF TEXAS,

ARISING FROM: CAUSE NO. 48,106-A
IN 188TH DISTRICT COURT OF,
GREGG COUNTY, TEXAS

APPELLANT'S BRIEF ON DISCRETIONARY REVIEW

ATTORNEY FOR APPELLANT:

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ORAL ARGUMENT NOT REQUESTED

IDENTITY OF JUDGE, PARTIES, AND COUNSEL

Pursuant to Tex. R. App. P. 68.4(a) (2014), the Judge, parties, and counsel in this suit are:

TRIAL JUDGE: The Honorable J. Scott Novy
 188th Judicial District Court

APPELLANT: JACE MARTIN LAWS
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APPELLEE: THE STATE OF TEXAS

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now Jeff T. Jackson, attorney for JACE MARTIN LAWS, Appellant in the above styled and numbered causes, and respectfully submits this Brief, and would show the Court the following:

STATEMENT OF THE CASE

Appellant was found guilty and sentenced by a jury of two counts of Assault on a Peace Officer resulting in sentences of 30 years confinement and 40 years confinement, TDCJ-ID.

The Sixth Court of Appeals of Texarkana found that (1) Appellant's argument that the State failed to prove his name is meritless, (2) the trial court did not abuse its discretion by striking a veniremember for cause due to a possible theft conviction, (3) the trial court's evidentiary rulings relating to the admission of extraneous offenses were not an abuse of discretion, (4) Appellant was not entitled to a lesser-included-offense instruction, (5) Appellant failed to preserve and adequately brief his argument that it was error to allow

an alternate juror to be present in the jury room during deliberations in violation of Tex. Code Crim. Proc. Art. 36.22, and (6) Appellant failed to preserve error for review that his sentences were grossly disproportionate to the offenses. The trial court's judgment was affirmed by the Sixth Court of Appeals.

The Court of Criminal Appeals granted discretionary review on the questions presented by this Brief.

NOTE:

The record is referred to as:

"COA Opinion" refers to the Opinion in Cause No. 06-19-00221-CR

"CR": clerk's record in Cause No. 48,046-A

"RR": reporter's record in Cause No. 48,046-A

"SX": State's exhibit

ISSUE PRESENTED

1. Did the Court of Appeals err in concluding that Appellant failed to preserve error?
2. Did the trial court violate Art. 36.22?
3. Is harm presumed when a trial court violates the first sentence of Art. 36.22?
4. Was Appellant harmed by the violation of the first sentence of Art. 36.22?

STATEMENT OF THE FACTS

On November 29, 2018, Appellant was indicted in two separate counts for Assault on a Peace Officer. CR pp. 5-8. Included in the indictment was one enhancement paragraph alleging a prior felony conviction, Appellant's punishment range to 5-99 years, or life in prison. CR p. 8.

The State of Texas presented its case in chief on October 22, 2019, See RR5, wherein Officers Lemmon and Byrdsong testified that they engaged Appellant in an incident wherein a struggle ensued and they were assaulted by Appellant. RR5 pp. 33-46, 76-83.

After both sides rested and closed, the trial judge directed the alternate juror to be present in the jury room during deliberations. RR6 pp. 5-8. In so doing the trial court admonished the alternate juror not to speak or participate in the deliberation process. RR6 p. 28. The jury found Appellant guilty of both counts. CR pp. 85-86.

At the punishment phase of the trial, the trial judge overruled Appellant's objection and sent the alternate juror to be present during jury during deliberations. RR7 p. 152. The jury returned sentences of 30 and 40 years confinement, TDCJ-ID. CR pp. 93-94.

SUMMARY OF THE ARGUMENTS

1. The Court of Appeals erred in concluding that Appellant failed to preserve error at trial because counsel timely and sufficiently made specific objection(s) to the alternate jurors presence during deliberations, and the trial court ruled adversely.

2. The trial court violated Art. 36.22 because the Legislature intended that alternate jurors should be separated until such time as they might be needed; alternate jurors should constitute "outside persons".

3. & 4. Harm is presumed when a trial court violates the first sentence of Art. 36.22, and the presumption of harm in this case was not rebutted by the State or otherwise by showing Appellant suffered no injury on account of the violation.

ARGUMENT 1.

THE COURT OF APPEALS ERRED IN CONCLUDING THAT APPELLANT FAILED TO PRESERVE ERROR.

The Sixth Court of Appeals, in its Opinion in Cause No. 06-19-00221-CR ("COA Opinion," hereinafter) argued that because Appellant failed to articulate the specific statutory violation, appellate review/error was not preserved under Tex. R. App. P. 38.1(i), and that in his appellate brief, Appellant did not comply with Tex. R. App. P. 38.1(h) and 38.1(i) by failing to argue how he was harmed by the trial court's allowing the alternate juror presence in the jury room during deliberations. However, the dissenting opinion in the COA Opinion cites *Duke v. State*, 365 S.W.3d 722, 725 (Tex.Crim.App. 2012) in support of the rule that "[a] party's failure to employ 'magic words' will not preclude error preservation if the party's complaint is sufficient to make the trial court aware of the grounds of the complaint."

The general rule for presenting a complaint for appellate review is a showing in the record (1) that the complaint was made to the trial court by a request, objection, or motion that was timely and sufficiently specific to make the trial court aware of the grounds of the complaint and (2) that the trial court ruled adversely (or refused to rule, despite objection). See *Pardue v. State*, 252 S.W.3d 690 (Tex.Crim.App. 2008), Tex. R. App. P. 33.1. At trial, Appellant objected to the presence of the alternate juror during deliberations. RR5 pp. 5-7. When asked if there were objections to the Jury Instructions, Appellant answered "it's allowing a juror, the alternate juror, to remain in the jury room. [. . .] I think there's just too much risk and the danger for them to bring input. [. . .] I think . . . we need to do like we always do and ask them to go downstairs and wait in the room." Id. Appellant also objected to the alternate juror being present during deliberations during the punishment phase, which was overruled. RR7 p. 152.

Here, Appellant made the complaint regarding the 36.22 violation to the trial court by a request, objection, or motion that was timely and sufficiently specific to make the trial court aware of the grounds of the complaint and (2) the trial court ruled adversely by denying the request. It's true that Appellant did not specifically cite Ar. 36.22 when making his objection, but that is not required by the rule outlined in *Purdue*. However, Appellant was specific in articulating to the trial court the reason for his objection: the possibility that the juror would "bring input" into the jury's deliberations. RR6 pp. 5-6. The trial court explained that it had allowed jury deliberations in this manner previously without issue, and Appellant pointed-out that "it may not have been objected to previously." RR6 p. 7.

Appellant articulated his concerns in the objection, which are the same concerns Art. 36.22 was promulgated to prevent. See *Chambliss v. State*, 647 S.W.2d 257, 266 (Tex.Crim.App. 1983) ("The primary goal of Article 36.22

is to insulate jurors from outside influence."). Error
was preserved for appellate review of this issue.

ARGUMENT 2.

THE TRIAL COURT VIOLATED ART. 36.22.

No person shall be permitted to be with a jury while it is deliberating. No person shall be permitted to converse with a juror about the case on trial except in the presence and by the permission of the court. Tex. Code Crim. Proc. Art. 36.22. In support it's argument that the trial court violated Art. 36.22, Appellant refers this Court to Footnote 24 of *Trinidad v. State*, 312 SW3d 23 (Tex. Court of Criminal Appeals 2010).

FN. 24:

Whether the alternate jurors constituted outside "persons" in contemplation of Article 36.22 depends, at least in part, upon the Legislature's intention when it amended Article 33.011(b). The State argued on appeal that Article 36.22 was not violated because amended Article 33.011(b) renders an alternate juror a part of the regular "jury" during its deliberations, so that the alternate juror would not

constitute an outside "person" in contemplation of Article 36.22's prohibition. The court of appeals found the text of Article 33.011 to be ambiguous, however, with respect to this question. [*Trinidad v. State*, 275 S.W.3d 52, 59 (Tex. App. 2008)]; [*Adams v. State*, 275 S.W.3d 61, 66-67 (Tex.Crim.App. 2008)]. Resorting, therefore, to legislative history, the court of appeals determined that the Legislature did not intend that alternate jurors should actually participate in jury deliberations prior to any disability of a regular juror, but should instead be separated until such time as they might be needed. *Id.* Given our ultimate holding, *infra*, that the appellants forfeited their statutory claims, we leave resolution of this issue for another day.

-*Trinidad*, 312 SW 3d 23, F.N. 23.

Here, the trial court overruled Appellant's objections to the court's instruction allowing the alternate juror to be present during jury deliberations during each phase of the trial. RR6 pp. 5-11. The

Legislature intended that alternate jurors should be separated until such time as they might be needed, which has persuaded this Court in Trinidad that the alternate juror should constitute an outside person under Art. 36.22. The trial court's instruction for the alternate juror to be present during jury deliberations was therefore a violation of Art. 36.22.

ARGUMENT 3 & 4.

HARM IS PRESUMED WHEN A TRIAL COURT VIOLATES THE FIRST SENTENCE OF ART. 36.22. APPELLANT WAS HARMED BY THE VIOLATION OF THE FIRST SENTENCE OF ART. 36.22.

As the court wrote in *Duke*, when Article 36.22 is violated, a rebuttable presumption of injury to the defendant arises. *Duke*, S.W.3d at 727; *Ocon v. State*, 284 S.W.3d 880, 884 (Tex.Crim.App. 2009); *Robinson v. State*, 851 S.W.2d 216, 230 (Tex.Crim.App. 1991). The State bears the burden of rebutting the presumption. *Robinson*, 851 S.W.2d at 230. The court should view the evidence in the light most favorable to the trial court's ruling when determining whether the State sufficiently rebutted the presumption of harm. *Ocon*, 284 S.W.3d at 884.

A new trial is required if there has been injury to the accused in this respect. As pointed-out above, injury in this scenario is presumed and must be rebutted by the State. Examples of methods of proving there has

been no injury include a showing by the State that the case was not discussed or a showing that nothing prejudicial to the accused was said. In such cases the verdict will be upheld. *McMahon v. State*, 582 S.W.2d 786 (Tex.Crim.App. 1979); *Williams v. State*, 463 S.W.2d 436 (Tex.Cr.App.1971). Here, there was no effort to rebut the presumption of harm.

PRAYER

Wherefore, premises considered, the undersigned counsel requests the Court of Criminal Appeals review the record and other matters in this case and reverse the ruling of the Court of Appeals, render an order for acquittal, or reverse the ruling of the trial court and remand the case for a new trial, and for such other and further relief to which Appellant is justly entitled.

Respectfully submitted,

/s/Jeff T. Jackson

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CERTIFICATE OF COMPLIANCE

The foregoing Appellant's Brief is in compliance with TEX. R. APP. P. 9.4(i)(2)(B). The total number of words contained in Appellant's Brief that are not specifically excluded from the word count under TEX. R. APP. P. 9.4(i)(1) is 1,775. /s/Jeff T. Jackson

Jeff T. Jackson

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that a true and correct copy of the above Motion was served on the State of Texas in accordance with the Rules of Civil and Appellate Procedure on the 15th day of June, 2021. I further certify that I have mailed a copy of the above Brief by First Class Mail, postage paid, to Appellant. /s/Jeff T. Jackson

Jeff T. Jackson

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

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